In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 344

JOSEPH KANDALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner is a former Supervisory Agent of the Internal Revenue Service. He was discharged by the Service for engaging in financial transactions with taxpayers whose tax returns were audited by agents under his supervision, in violation of Section 29 of the Service's Rules of Conduct (Pet. 3).

Specifically, petitioner purchased an automobile from a dealer whose tax returns were audited by agents under his supervision; petitioner arranged with the dealer to have the transaction appear as though the car had been purchased from another dealer with whom petitioner had no official connection (Pet. App. A–12 to A–13, A–21). In addition, while petitioner was one of twenty investors in a corporation

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formed for the purpose of investing in securities, the tax returns of the corporation's president were audited by agents under petitioner's supervision; petitioner personally reviewed and approved one such audit (Pet. App. A–13 to A–14, A–16, A–21 to A–22).

After formal charges and a hearing within the Internal Revenue Service, petitioner was discharged. On appeal, the Civil Service Commission upheld the discharge.

Petitioner then instituted the present action in the Court of Claims for back pay, alleging that his discharge was arbitrary, capricious and unlawful. The Court of Claims dismissed the suit, adopting the findings and conclusions of the Trial Commissioner that petitioner's discharge was imposed after proper procedures and that, in light of the largely uncontested facts, the discharge was not unreasonable (Pet. App. A–1 to A–2, A–27 to A–33).

The two claims raised by the petition are that the prohibition in Section 29 of the Service's Rules against "business or financial transactions" with taxpayers with whom an employee has an official connection is an unconstitutionally vague standard upon which to base removal from the Service; and that even assuming the validity of Section 29, the remedy of discharge was unduly harsh in the light of the petitioner's previous record as an employee and his assertion that he had not profited from either of the two transactions. Neither of these claims warrants further review.

Petitioner is in no position to argue that Section

29 was so vague that he was unable to conform his conduct to it. No serious argument can be made that petitioner's joining in a small investment syndicate while retaining control of the auditing of the tax returns of the syndicate's president was not an unmistakable "business or financial transaction" with a taxpayer with whom petitioner had an official connection. It is even clearer that petitioner knew he was violating Section 29 in purchasing the automobile, for he admitted that his arrangement with the automobile dealer to have the car appear to have been sold by another dealer was devised in order to erase the impropriety from the face of the transaction (Pet. App. A–6 to A–7).

The question whether the discharge of petitioner for this misconduct was too harsh a remedy in the circumstances is principally committed to the Service's discretion and presents no occasion for review in this Court. As to petitioner's claim that he made no financial gain from the transactions, it is a full answer that the behavior of employees of the Internal Revenue Service cannot involve even the appearance of misconduct.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1969.

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